

Distr.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD N. BURDICK,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 2 349 471)

DOCKET NUMBER
SF08319110211

DATE:

JUN 19 1991

Ronald N. Burdick, Saint George, Utah, pro se.

John Panagakos, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of the February 26, 1991 initial decision sustaining the reconsideration decision of the Office of Personnel Management (OPM). We GRANT the petition, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING OPM's reconsideration decision recomputing the appellant's civil service retirement annuity.

BACKGROUND

The appellant retired on October 31, 1982, and his civil service annuity was based in part on post-1956 military service. Since he elected not to make a deposit to receive civil service credit for such military service, see Agency File, Tab 4, OPM subsequently reduced the appellant's annuity by eliminating credit for his post-1956 military service when he became eligible for social security benefits in August 1989. See Pub. L. Nos. 84-881 (Aug. 1, 1956) and 97-253 (Sept. 8, 1982) (both codified at 5 U.S.C. § 8332).

In his initial decision, the administrative judge affirmed OPM's reconsideration decision. He found that the 1956 statute mandated the reduction in the annuity and that the 1982 statute allowed deposits, which the appellant elected not to make, to avoid the reduction.

In his petition for review, the appellant argues that OPM should have used an alternative method to compute his annuity, that this argument was raised below, and that the administrative judge misunderstood his claim and did not determine the applicability of the alternative method of annuity computation.

ANALYSIS

The specific claim asserted in the appellant's petition for review was raised below. See Appeal File, Tab 1. The administrative judge should have resolved it in the initial decision. See *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). For the reasons set forth below, however, the error did not prejudice the appellant's substantive rights. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). Thus, there is no basis for reversal or remand.

Pub. L. No. 97-253 established a new method of computing the post-1956 military reduction for annuities based on a final separation on or before September 8, 1982, the effective date of the statute. These annuities would be reduced by one of two methods, whichever resulted in the smaller reduction, and the larger monthly annuity. See Agency File, Tab 6 (OPM's initial decision). The reason for this provision was that Pub. L. No. 97-253 did not afford individuals who separated on or before September 8, 1982, the opportunity to elect to make a deposit and avoid the annuity reduction. The alternative method of computation did not apply to retirees who separated from Federal service after September 8, 1982, because they could make deposits to avoid the reduction. *Id.*

Although the appellant claims that he could have retired on August 21, 1982, he actually retired on October 31, 1982, and, therefore, he was not eligible for the computation option which resulted in the smaller reduction. See *Hartness v. Office of Personnel Management*, 30 M.S.P.R. 360, 362 (1986) (use of alternative statutory formula in the case of annuitants who retired before September 9, 1982). See also *Ferr v. Office of Personnel Management*, 29 M.S.P.R. 284, 286 (1985) (section 307(b) of Pub. L. No. 97-253 contains the requisite formula for determining the amount of any reduction in a Civil Service annuity due to an annuitant's eligibility for social security benefits), *aff'd*, 802 F.2d 469 (Fed. Cir. 1986) (Table). Pursuant to 5 U.S.C. § 8332(j), the appellant's post-1956 military service had to be excluded from computation of his retirement annuity. See *Schirmer v. Office of Personnel Management*, 39 M.S.P.R. 559, 560 (1989).

Therefore, we find that OPM applied the appropriate statutory formula to the appellant, an annuitant who retired after September 8, 1982, and its reconsideration decision is correct.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See

5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.